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**The first pilot study in Niger by the African Commission of Human Rights and Peoples' Rights regarding the rights of migrants in Africa**

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**Abstract:** This paper seeks to highlight an important step towards the protection of migrants' rights in Africa. The African Commission of Human Rights and Peoples' Rights through the Resolution ACHPR/Res. 404 (LXII) 2018 highlighted a series of ad hoc studies for migration and respect for human rights with the aim of acquiring the parameters to improve the effectiveness of its territories. In 2019, according to the powers attributed to Article 45 of the African Charter on Human and Peoples' Rights, the African Commission of Human Rights and Peoples' Rights proposed the first study in the Nigerian state. A report was also adopted by the committees of the UN, as a document that does not aim to put the spotlight on individual state failures but to investigate on the basis of the data that is obtained as a problem

of its own generality. The Commission believes that migration is not an *ex se* problem but a natural phenomenon which leads to the exercise of the right to freedom of movement which has been sanctioned and protected by international human rights law and focused on serious violations of human dignity especially in the period of displacement. This is a research result that examines the human rights situation in Niger as a state of departure and transit and which provides an analysis to a regulatory, institutional and strategic framework of the state on the protection of migrants. The results are highlighted in the positions that are taken by the African Commission and in cases of violation of the rights that are enshrined in the charter and towards migrants from a comparative perspective and in connection with other international bodies.

**Keywords:** Niger; pilot study; migration in Africa; protection of human rights; outsourcing of the EU; ACHR; ACHRPR; ECOWAS; EUFT.

## **Introduction**

The migration phenomenon on the African continent and especially in Nigeria was a topic to be discussed and investigated according to the African Commission of Human Rights and Peoples' Rights (ACHRPR) especially after the continuous and various violations of the human rights of migrants<sup>1</sup>. Violations which are based on international obligations and which are assumed by states according to the Banjul Charter of 1981<sup>2</sup>.

The ACHRPR's need for an ad hoc investigation was necessary

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<sup>1</sup>See ex multis: ACHPR, 114 Resolution on Migration and Human Rights, ACHPR/Res. 114(XXXXII)07, 28 November 2007; ACHPR, 333 Resolution on the Situation of Migrants in Africa, ACHPR/Res.333(EXT.OS/XIX), 25 February 2016; ACHPR, Banjul Declaration of The 59th Ordinary Session of The African Commission on Human And Peoples' Rights Under the Theme "Women's Rights: Our Collective Responsibility", 4 March 2017; ACHPR, 371 Resolution on the Implementation of the New York Declaration for Refugees and Migrants, ACHPR/Res. 371 (LX), 22 May 2017; ACHPR, 398 Resolution on mixed migratory flows, the challenges of protecting migrants and the prohibition of trafficking in persons and all forms of violence in North and Sub Saharan Africa, ACHPR/Res. 398, 9 May 2018; ACHPR, 481 Resolution on the Need for a Study on African Responses to Migration and the Protection of Migrants with a view to Developing Guidelines on the Human Rights of Migrants, Refugees and Asylum Seekers, ACHPR/Res. 481 (LXVIII), 4 May 2021.

<sup>2</sup>The Banjul Charter was adopted in 1981 and came into force in 1986. It is a binding charter for African states with the exception of Morocco.

due to the lack of precise data collections from international and non-governmental organizations as well as research on migration focuses more on economic, political and demographic aspects<sup>3</sup> which resulted in the publication of the first Pilot study on migration and respect for human rights on Niger in 2019<sup>4</sup>. This is a document that collected the violations that occurred against migrants during their movements through Niger<sup>5</sup>, identifying the type of violations in the Nigerian area as well as the countermeasures made by other countries, directing the various stakeholders who were involved in the management of the migratory phenomenon in country as well as an approach based

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<sup>3</sup>ACHPR, Pilot Study on Migration and Respect for Human Rights Focus on the Responses Provided by Niger. 25 November 2019, p. 14.: <https://achpr.au.int/en/node/900>

<sup>4</sup>Based on Art. 45, par.1.a), of the African Charter on Human and People's Rights of 1981, the Commission also has the task of: Collecting documentation, carrying out studies and research on African problems in the field of human rights and peoples, organize seminars, talks and conferences, disseminate information, encourage national and local bodies dealing with human and peoples' rights and, where appropriate, give opinions or make recommendations to governments.

<sup>5</sup>Pilot Study on Migration and Respect for Human Rights Focus on the Responses Provided by Niger, op. cit., p. 14: “(...) The itinerary in this study includes the transit period in Niger (or departure period for migrants from Niger), the stay in the country of temporary residence (Libya and Algeria) and the period of voluntary or involuntary return to Niger (...)”.

more on the protection of human rights.

The survey and the related study was the result of a qualitative and quantitative research which was, we can say, concluded at a very short period of time, i.e. between December 2018 and January 2019 and based on the request of approximately 400 declarations from migrants living in the areas of Agadez and Zinder. A request based on a series of continuous questions that are addressed by the ACHRPR in public and private structures that are involved in the management of the migratory affair in the Nigerian context<sup>6</sup>.

Of course, the data was not sufficient to reach precise conclusions and above all the biggest problem was the

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<sup>6</sup>Pilot Study on Migration and Respect for Human Rights Focus on the Responses Provided by Niger, op. cit., p. 17: “(...) in particular, the Directorate of Migration at the Ministry of Interior, Security, Decentralization and Customary and Religious Affairs, the General Directorate of Human Rights of the Ministry of Justice of Niger, the Ministry of Women’s Development and Child Protection, the National Human Rights Commission, the National Agency to Combat Trafficking in Persons, the Municipality of Kourni Commune (Kantché region of Zinder), the Niger High Authority to Combat Corruption and Related Offences, the High Command of the National Guard, the Directorate of Territorial Surveillance of the National Police, the High Command of the National Gendarmerie, the NGO Collectif des organisations de défense des droits de l’homme et de la démocratie (Coddhd) and the NGO Jeunesse enfance migration et Développent (JMED) (...)”.

immigration of people towards the Mediterranean. On the other hand, the United Nations Office on Drug Control and Crime (UNODC) on another search from Western and Southern Africa reached long-term embarkation points especially on the North African coasts which were forced to cross the Sahara desert and passing the Zinder region and the gateway of Agadez (Molenaar, 2017; Raineri, 2018)<sup>7</sup>. The passage through Nigerien territory transformed a long transit road and assistance center in the Nigerian ghettos waiting for vehicles, useful resources for the journey where migrants often fell into the hands of passers and all that this practice meant<sup>8</sup>. The transit corridor between Niger as a point of departure and destination for migrants had poverty<sup>9</sup> as the primary reason for leaving the country as well as the risk of Boko Haram jihadist groups especially in the Diffa region<sup>10</sup>.

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7UNODC, Transnational Organized Crime in West Africa: A Threat Assessment, 2013. UNODC, Stratégie régionale de lutte contre la traite des personnes et le trafic illicite de migrants 2015- 2020.

8UNODC, Global Study on Smuggling of Migrants 2018, p. 7.

9UNDP, Human Development Index and its Component, 2019: <http://hdr.undp.org/en/composite/HDI>

10Human Rights Council, Violations and abuses committed by Boko Haram and the impact on human rights in the countries affected, Report of the United Nations High Commissioner for Human Rights, A/HRC/30/67, 9 December 2015; UNHCR, Security and humanitarian situations worsen in

There are numerous cases that had to return to Niger given the forced and mass expulsions that were carried out in Algeria and Libya (IOM, Hamidou, 2009; Malakooti, 2022).

The migratory route was the result of underdevelopment in Western and Southern Africa after numerous internal armed conflicts where the effects of climate change, the food crisis and the hygiene pandemic of recent years have favored violations of the human rights of migrants which explain the ineffectiveness of interventions that are carried out by the state. With the exception of the movements of citizens of ECOWAS Member States within the organization perimeter<sup>11</sup> most migrations in Nigeria were

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Diffa, Niger, as Boko Haram continues attacks in the region , 24 May 2016; UNHCR, Synthèse et Analyse sur les déplacements forcés dans la région de Diffa-Niger-Crise Nigéria, 13 June 2016; Amnesty International, Amnesty International Report 2017/18-Niger, 22 February 2018; UN Security Council, Activities of the United Nations Office for West Africa and the Sahel Report of the Secretary-General, S/2020/585, 4 June 2020, par. B; UNHCR, Niger: UNHCR Submission for the Universal Periodic Review-Niger-UPR 38th Session (2021), October 2020, p. 2.

11Pilot Study on Migration and Respect for Human Rights Focus on the Responses Provided by Niger, op. cit., pp. 21 and 22): “(...) the abolition of visas for ECOWAS nationals considerably reduces the illegality of migration in the ECOWAS region but does not eliminate it completely (...) the majority of West African migrants who transit through ECOWAS countries such as Niger to reach North Africa and often Europe are in order as long as they are in the ECOWAS region. For many of them, illegality begins when they cross the ECOWAS region because most of them are not



irregular despite the criminalization of migrant trafficking as well as law no. 36/2015 which was managed by the network of local traffickers.

The ACHRPR, emerging from the logic of regularity and movements that characterizes migration in West Africa and Niger, has as its basis the inhumane phenomenon of violence and abuse towards migrants. Thus profiles of international responsibility of the state are outlined in relation to the obligations of promotion and protection of human rights which are enshrined in the African Charter on Human and Peoples' Rights as well as other international treaties on human rights where the same state is a contracting party<sup>12</sup>.

Human rights violations is the result of the effect of actions of irregular immigration in Niger as well as of funding from the EU. Identify the information provided in the ACHRPR in the Pilot Study on Migration and Respect for Human Rights Focus on the Responses Provided by Niger, the actions undertaken by the

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in possession of the travel documents required to enter the other zones (...)"

<sup>12</sup>See the Pilot Study on Migration and Respect for Human Rights Focus on the Responses Provided by Niger, pp. 58 and 59.

Niger state combat irregular immigration and migrant trafficking thus evaluating compliance with international human rights law and the African Charter of Human Rights of 1981. Perhaps within this framework, law 36/2015 was envisaged and adopted relating to the illicit trafficking of migrants in the exercise of the right, movement and, freedom as a starting point for greater protection of human rights.

### **Irregular migration in Niger, externalization policies of the EU and protection of human rights**

The study we analyze informed us that the majority of migrants who left Africa towards countries of the EU had as a point of thought the higher standard of living, greater economic and social opportunities especially after the crisis of 2013 which developed a global strategy for irregular immigration to the specific protection of internal security in the European space, i.e. the public order of the Member States. This is a leadership position that contrasts with the phenomenon of illegal migration and the illicit trafficking of migrants in Africa.

The approach of a border externalization model actively involves

the strategic partners of the African States within the legal framework of development cooperation as a subordinate point of the immigration objective which has made the African States themselves also attract ad hoc funding from the organization as main actors in the fight against illegal immigration. As a consequence of the European Agenda on Migration in 2015, Niger has become one of the main beneficiaries of aid, considering the development of the management of the external borders of the EU as essential due to its strategic position on the routes towards the Mediterranean. The European Union Emergency Trust Fund for stability and the fight against the root causes of irregular migration and the phenomenon of displaced persons in Africa (EUFT)<sup>13</sup> has invested approximately 2,154

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<sup>13</sup>European Commission, Fact Sheet, EU cooperation with Niger, Brussels, 13 December 2017:

[https://reliefweb.int/sites/reliefweb.int/files/resources/MEMO-17-](https://reliefweb.int/sites/reliefweb.int/files/resources/MEMO-17-5234_EN.pdf)

[5234\\_EN.pdf](https://reliefweb.int/sites/reliefweb.int/files/resources/MEMO-17-5234_EN.pdf)): “(...) the Trust Fund benefits a wide range of countries in Africa, especially those located along the main African migration routes to Europe. Niger is one of those countries. Nine projects, worth a total of EUR 190 million, have already been approved for Niger under the Trust Fund. These projects are the EU’s practical response to commitments undertaken as part of the Action Plan adopted at the Valletta Summit on 11 and 12 November 2015, in which Niger will play a highly pro-active and constructive role. Niger is currently the main beneficiary of the Trust Fund (...)”.

million euros per year in favor of the countries of the Sahel/Lake Chad region, i.e. part of Niger<sup>14</sup>. This is a very important figure for the area and above all for the security policies proposed by the EU.

The related conditionality mechanism laid the foundations for the disbursement of European funds which led the Nigerian state to undertake a series of actions to combat irregular migration and the phenomena underlying it. We also remember from the past the adoption of decree no. 2014-384/PRN/MJ which aimed to strengthen the ACHRPR to a broader national coordination to combat human trafficking (CNCLTP)<sup>15</sup>. The organization is designed to develop, promote national policies and programs that were related to human trafficking, thus giving it an important role

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<sup>14</sup>EU, EUFT for Africa. The EU Emergency Trust Fund for stability and addressing root causes of irregular migration and displaced persons in Africa, 2020:

[https://ec.europa.eu/trustfundforafrica/sites/default/files/factsheet\\_eutf-for-africa\\_january\\_2021\\_0.pdf](https://ec.europa.eu/trustfundforafrica/sites/default/files/factsheet_eutf-for-africa_january_2021_0.pdf)

<sup>15</sup>“(…) the CNLTP was created by Ordinance No. 2010-086 of 16 December 2010 on combating trafficking in persons and placed under the authority of the Minister of Justice, by Decree No. 2012-082/PRN/MJ of 21 March 2012, amended by Decree No. 2014- 684/PRN/MJ of 30 October 2014 (…).”. Pilot Study on Migration and Respect for Human Rights Focus on the Responses Provided by Niger, op. cit., p. 70.

of active participation within the procedure of the entitled: “Universal Periodic Review of the United Nations”, as well as the drafting of the reports that Niger is a party to the UN human rights treaties and of the relevant treaty bodies. The ACHRPR operation was based on the national agency for combating trafficking in human beings (ANLTP)<sup>16</sup> as task of implementing the policies and strategies of the CNCLTP as well as on the national action plan against trafficking in human beings humans who was adopted in July of 2014<sup>17</sup>.

The agency from 2019 was distinguished thanks to the support of the international organization for migration. The Nigerian center welcomed victims from human trafficking in the Zinder region aiming at supporting local authorities to assist victims of human trafficking humans who were in the repatriation stage, reintegration into the various communities and countries of

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16Pilot Study on Migration and Respect for Human Rights Focus on the Responses Provided by Niger, op. cit., p. 70: “(...) the National Agency to Combat Trafficking in Persons (ANLTP): It is established by the same Ordinance that set up the CNCLTP and placed under the authority of the Minister of Justice by Decree No. 2012-083/PRN/MJ of 21 March 2012 (...)”.

17See the National Action Plan to Combat Trafficking in Persons, adopted with decree n. 2014-488/PRN/MJ of 22 July 2014.

origin. The obviously non-existent economic resources and the lack of specialized personnel prevented the Agency from fulfilling its mandate, nullifying the national coordination initiatives of the ACHRPR.

Law no. 36/2015 was also reported on illicit traffic of migrants where according to data from the IOM it had the effect of reducing the number of movements towards the north<sup>18</sup>. Quickly referring to numbers, let's remember that around 290 thousand migrants from Niger to Libya in 2016 alone rose to 24 thousand in the first five months of 2018. These are figures that are impressive within the European context but not so much now. Since 2016, after the intervention of the then Minister of the Interior Mohamed Bazoum (who is now President of Niger), the law has guided an illegality plan not only related to the trafficking of migrants but also to activities that are connected with the migrations. On the other hand, the activity of aiding and abetting irregular migration, the stakeholders in the migratory chain, the transporters and those hosting the migrants have provided various heavy penalties for those who facilitated the

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<sup>18</sup>Pilot Study on Migration and Respect for Human Rights Focus on the Responses Provided by Niger, op. cit., p. 33.

illegal entry or exit into the country of a person who was without citizenship or permanent residence leading to imprisonment of up to ten years and especially if they were women who were pregnant, minors and disabled people in aggravated circumstances. The positive effects that were recorded in the reduction of flows, as well as the adoption of the law, produced a series of secondary effects on an internal level that were devastating.

The repression which had the effect of making the migratory routes a dangerous target: “(...) smugglers and migrants take longer roads to circumvent security checks (...)” (Molenaar, 2017) and as the UN Committee for Human Rights reported in the related concluding observations that are presented in the 2019 automatically increase the clandestine nature of migration as well as the risk of other violations of human rights that are part of the Banjul Charter and not only<sup>19</sup>. The abandonment of migrants to the desert after data from the IOM are elements that in the following years implement the law in the number of dead and missing migrants through the passage to the desert which was

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<sup>19</sup>CCPR, Concluding observations on the second periodic report of the Niger, March 2019, CCPR/C/NER/CO/2, 16 May 2019, para. 38.

increased<sup>20</sup> reaching extraordinary figures in 2019<sup>21</sup>.

The legislation is varied and often complex as regards the legal status of migrants which presupposes an unjustified irregularity of their conditions: “(...) in fact, according to the law, it is difficult to know who is the victim and who is the auteur (...)”<sup>22</sup>.

On the other hand, the United Nations Special Rapporteur on the human rights of migrants in his Report on Niger which he provided to us on 16 May 2019 stated that:

“(...) the need to reform law 36/2015 to clarify its purpose and provisions ensures that it does not criminalize or victimize migrant persons (...)”<sup>23</sup>.

The equivocality of the passages inherent to the procedural guarantees of migrants in detention was also criticized, as the reasons why the migrants would end up under arrest<sup>24</sup>, while, also

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20 Pilot Study on Migration and Respect for Human Rights Focus on the Responses Provided by Niger, op. cit., p. 34.

21 <https://missingmigrants.iom.int/region/africa>

22 Déclaration de fin de mission du Rapporteur Spécial des Nations Unies sur les droits de l’homme des migrants, Felipe González Morales, lors de sa visite au Niger (1-8 octobre, 2018), Niamey, le 8 octobre 2018.

23 UNGA, Report of the Special Rapporteur on the human rights of migrants, A/ HRC/41/38/Add.1, 16 May 2019.

24 Déclaration de fin de mission du Rapporteur Spécial des Nations Unies sur les droits de l’homme des migrants, 2018, op. cit.: “(...) bien que l’objectif allégué de la loi soit de prévenir et de combattre le trafic illicite de migrants et de protéger les droits des migrants, la loi autorise la détention de migrants soumis au trafic illicite, sans préciser les motifs de cette détention,



in the opinion of the ACHRPR, the measures aimed at limiting the exercise of freedom of movement “should not be vaguely constructed”<sup>25</sup>.

The law is also criticized for the effects it produces on the national economy. It seems that the country's conditions are critical and have worsened after 2015 given that:

“(...) what was previously the main source of subsistence for local industries has become an illegal phenomenon (...) with the further consequence that many of the activities related to the migration industry (such as, for example, the transport of migrants) have been integrated into the sphere of organized crime affairs (...)”<sup>26</sup>.

Law 36/2015, the human costs of fighting the illicit trafficking of migrants, as well as the secondary effects that are products of the same law, refer to the fight against the illicit trafficking of migrants, the containment of flows, the benefits not obtained and, the lack of verification of the actions undertaken by Niger in implementation of the legislation that considers international human rights law specific to the African Charter on Human and People's Rights of 1981.

The prosecution of illicit trafficking was not only an African  
ce qui constitue une grave préoccupation (...)”.

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25ACHR, General Comment No. 5, op. cit., par. 16.

26ACHR, General Comment No. 5, op. cit., par. 16.

topic but a continuous struggle for a possible solution by international bodies that are committed to the protection of human rights who believe the effective fight against the phenomenon in an appropriate way that fuels human rights violations against migrants. Already since 2013 the legal context was different from that in Niger as noted by the UN Committee for the protection of the rights of migrant workers and their families, underlining that each state has full discretion for the purposes of controlling and regulating irregular migration, the criminalization upon entry of categories of migrants which represents a disproportionate measure that respects the objective it pursues in particular:

“(...) legitimate interest of the state (...) to control and regulate illegal immigration, especially where it is considered that entry, as well as illegal stay, fall within the scope of the so-called administrative offenses (...)”<sup>27</sup>.

Within the UN it has been highlighted that the policies are restrictive for irregular immigration which favor arbitrary detentions which have the effect of increasing the conditions of vulnerability of migrants and asylum seekers, exposing the risk

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<sup>27</sup>CMW, General Comment No. 2 on the Rights of Migrant Workers in an Irregular Situation and Members of Their Families, CMW/C/GC/2, 28 August 2013, par. 24.

of abuse and violence during the journey towards destination countries<sup>28</sup>.

The exercise of the right to freedom of movement which was understood as the right to leave one's country and the right of any person who is lawfully within the territory of a state to move freely therein. This was guaranteed according to the nationality where the same body has reported the violation of Articles 2 and 3 of the African Charter concerning the right to non-discrimination, the right to equality before the law<sup>29</sup>.

The subjects involved in the practice had the consequence of paying sums to the police and not only to cross the borders and related blockades without any consequences despite the right to move freely within the Nigerian territory which was extended to citizens of other African states from a series of regional and bilateral agreements. The ACHRPR according to Art. 12 of the

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28CMW, CRC, Joint General Comment No. 4 (2017) of the Committee on the Protection of the Rights of All Migrant Workers and Members of Their Families and No. 23 (2017) of the Committee on the Rights of the Child on state obligations regarding the human rights of children in the context of international migration in countries of origin, transit, destination and return, CMW/C/GC/4-CRC/C/GC/23, 16 November 2017, par. 40.

29Pilot Study on Migration and Respect for Human Rights Focus on the Responses Provided by Niger, op. cit. p. 28.

African Charter: “(...) to ensure that arbitrary distinctions on movement are not drawn between nationals and non-nationals (...)” ensured non-discrimination for foreign citizens who entered illegally within the territory of the state and are awaiting to regularize one's position legally<sup>30</sup>.

The ACHRPR has attempted not to violate the obligations to protect human life according to art. 4 which criticizes state's inability to help migrants who are abandoned and in distress, especially on the border with Algeria<sup>31</sup>. The Special Rapporteur for the rights of migrants, as well as the local authorities, lack structures and means suitable for rescue, providing a minimum of assistance, thus supporting the IOM and non-governmental organizations. The obligations to protect human life and the ACHRPR showed a profile of responsibility based on Art. 18 of the African Charter which had to do with the protection of families and vulnerable groups. The emphasis on the inhuman conditions in which migrant women and minors live in assistance

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30ACHPR, General Comment No. 5 on the African Charter on Human and Peoples' Rights: The Right to Freedom of Movement and Residence, (Article 12(1)), November 10, 2019, par. 9.

31Pilot Study on Migration and Respect for Human Rights Focus on the Responses Provided by Niger, op. cit., p. 31.

centers obtaining protection as vulnerable subjects suffer the worst consequences of trafficking due to the abuses they have to do with passers and the continuous and relative negligence and disorganization of structures of the bodies that are responsible for their protection<sup>32</sup>. The Pilot Study emblematically reported the lack of female staff within reception centers with various types of criticism relating to the forced inspection and search of migrants always by male staff<sup>33</sup>.

The IOM also reported various violations of art. 5 relating to serious abuses that had been carried out in the police forces, border patrols and checkpoints, i.e. the Defense and Security Forces (DSF) and the Internal Security Forces (ISF)<sup>34</sup>. Many

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<sup>32</sup>Pilot Study on Migration and Respect for Human Rights Focus on the Responses Provided by Niger, pp. 47-51. Déclaration de fin de mission, du Rapporteur Spécial des Nations Unies sur les droits de l'homme des migrants, 2018, op. cit.: "(...) (d)ans le cas des femmes migrantes, la loi sur le trafic illicite de migrants les a rendues plus vulnérables aux abus et à l'exploitation sexuelle. En effet, j'ai appris avec inquiétude qu'il y a des femmes migrantes qui sont prises au piège à Agadez sans pouvoir se déplacer plus au nord dans leur parcours migratoire. En raison du manque d'accès aux moyens et aux services les plus élémentaires, ces femmes sont obligées de se prostituer pour survivre (...)".

<sup>33</sup>Pilot Study on Migration and Respect for Human Rights Focus on the Responses Provided by Niger, op. cit., p. 50.

<sup>34</sup>UNHCR, Routes Towards the Western and Central Mediterranean Sea. Working on Alternatives to Dangerous Journeys for Refugees, January

times migrants found themselves in the situation of paying the police and not only under threat and fear, thus violating Art. 14 of the African Charter as well as for the confiscation of documents and the infliction of terrible corporal punishment<sup>35</sup>. We note the lack of adequate reparation mechanisms and the perpetration of abuses leading to a violation of article 5. The provision in question derives from the obligation for states on the part of the Charter to guarantee reparation to the victims of the related abuses to restore a person's dignity, humanity and trust<sup>36</sup>, trying to ensure access to justice as an important right, paving the way for the damages suffered as well as the restoration of the status quo ante, the guarantees of non-repetition of behaviors detrimental to human dignity and in serious cases to concrete support in terms of social and psychophysical rehabilitation.

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2021: <https://www.unhcr.org/media/routes-towards-western-and-central-mediterranean-sea-working-alternatives-dangerous-journeys>

35Pilot Study on Migration and Respect for Human Rights Focus on the Responses Provided by Niger, op. cit., p. 43.

36African Commission on Human and People's Rights, General Comment No. 4 on Article 5 of the African Charter on Human and Peoples' Rights: The Right to Redress for Victims of Torture and Other Cruel, Inhuman or Degrading Punishment or Treatment (Article 5), Adopted at the 21st Extra-Ordinary Session of the African Commission on Human and Peoples' Rights, held from 23 February to 4 March 2017 in Banjul.

Through the relevant interviews of migrants, a smaller number stated that they had taken legal action in order to obtain judicial protection. Thus the ACHRPR also stated that:

“(...) just as the impossibility of exercising jurisdictional rights, whether it depends on the lack of structures and services provided for this purpose or whether it arises from the inadequacy of existing ones, also constitutes a violation of the rights enshrined in Article 7 of the Charter (...)”<sup>37</sup>.

Within this context, the Body went forward by criticizing the provision of imprisonment among the punitive measures that are foreseen between Law 36/2015 and Ordinance no. 81-40 of 29 October 1981<sup>38</sup> as incompatible with the exercise of the right to

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<sup>37</sup>According to art. 7 of the ACHRPR: “(...) 1. Every person has the right to have their reasons heard. This includes: a) the right to bring before the competent national courts any violation of the fundamental rights which are recognized and guaranteed by the conventions, laws, regulations and customs in force; b) the right to the presumption of innocence until his guilt is established by a competent jurisdiction; c) the right to defence, including the right to be assisted by a lawyer of one's choice; d) the right to be tried within a reasonable time by an impartial jurisdiction. 2. No one can be convicted for an action or omission which, at the time it took place, did not constitute a legally punishable infraction. No penalty can be imposed if it was not foreseen at the time the offense was committed. The punishment is personal and can only affect the criminal (...)”.

<sup>38</sup>Pilot Study on Migration and Respect for Human Rights Focus on the Responses Provided by Niger, op. cit., p. 38: “(...) (h)owever, the absence of centres specifically dedicated to the detention or retention of migrants does not necessarily mean that there are no cases of migrant detention. There are indeed allegations of the growing use of retention or even detention of migrants in Niger (...). In any event, Ordinance No. 81-40 of

freedom and personal security as established by Art. 6 of the African Charter and as highlighted by the Committee for the protection of the rights of migrant workers and their families in general comment no. 2 of 2016 which affirmed that should therefore be an exceptional necessary and proportional measure<sup>39</sup>. The ACHRPR regarding the arrest, detention of irregular migrants and the methods that were implemented present profiles of incompatibility that are related to the obligations that are provided for by art. 9, on the right of access to information and freedom of expression to migrants who are in the stage of arrest, general detention and provided with information on the reasons for their status where international standards:

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29 October 1981 on the entry and stay of aliens in Niger provides for imprisonment as a sanction against aliens who have entered or are staying in Niger unlawfully (...)"

39CMW, General Comment No. 2 on the rights of migrant workers in an irregular situation and members of their families, CMW/C/GC/2, 28 August 2013, para. 24, 25. CMW, Concluding observations on the initial report of the Niger, CMW/C/NER/ CO/1, 11 October 2016, para. 32 b) and c). Pilot Study on Migration and Respect for Human Rights Focus on the Responses Provided by Niger, op. cit., p. 66: "(...) the right to contact consular officials, if desired; right to receive visits from consular officials; right to maintain contact and correspond with consular officials; right to receive communications from consular officers without delay; right to receive information about their rights in their original language (...)"



“(...) require that migrants be provided with a certain amount of information to be communicated to the detained persons, including the grounds for arrest, the charges against the person and the right to contact consular authorities (...)”<sup>40</sup>.

The detention had the opportunity to note the hygienic and health conditions faced by the detainees and the ACHRPR also noted the violation of Art. 16 of the African Charter relating to the right to health where the Organization appears to compromise the clandestine status and push irregular migrants not to benefit from medical care and health services for fear of the sanctions which are pre-established by Law 36/2015 (Malakooti, 2022).

The Pilot study referred to the existence of a link between causality and the adoption of Law no. 36/2015 for the violation of rights that are enshrined in the Charter as “the result of specific products” which determine the violation of many articles that the ACHRPR took into consideration, having a deterrent effect and increasing the costs, risks and times of migrations.

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<sup>40</sup>Pilot Study on Migration and Respect for Human Rights Focus on the Responses Provided by Niger, op. cit., p. 40.

**Right to freedom of movement and Law 36/20015**

The right to freedom of movement and Law 36/2015 are connected with a causal link that comes from the violation of the right to freedom of movement which was enshrined in Article 12 of the Banjul Charter and was also reported to ECOWAS, to the protocols on free movement that have been adopted since 1979<sup>41</sup>. Everyone has the right to move freely and to choose their residence within the country they live in, as well as to leave the country and return at any time. Law that affirms the provision and does not allow restrictions and exceptions provided by law which make necessary the protection of national security, public order, public health and morals<sup>42</sup>. The ACHRPR thus affirmed the

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<sup>41</sup>See the 1979 Protocol relating to freedom of movement, residence and establishment (A/P.1/5/79) and the Additional Protocols of 1985 (A/SP.1/7/85), 1986 (A/SP. 1/7/86), 1989 (A/SP 1/6/89) and 1990 (A/SP 2/5/90).

<sup>42</sup>Pilot study on Migration and Respect for Human Rights Focus on the Responses Provided by Niger, op. cit., p. 64: “(...) the exercise of these rights then undergoes a particular expansion within the ECOWAS area (which includes Benin, Burkina Faso, Cape Verde, Ivory Coast, Gambia, Ghana, Guinea, Guinea Bissau, Liberia, Mali, Niger, Nigeria, Senegal, Sierra Leone, Togo) where citizens of the Organization's member states can - thanks to the regime established by the 1979 Protocol - enter and reside (for a maximum of 90 days), even if they have regular travel documents without having to present any visa. See also Art. 3 of Ordinance 8-40 of 1981. It establishes that in no case: “(...) nationals of states that have concluded an

restrictions on the exercise of the right that may be considered admissible and which are proportionately inherent to the pursuit of a legitimate aim as provided for in Article 12, par. 2 and which are necessary for a free, democratic society respecting the principles of equality and non-discrimination<sup>43</sup>. Within this context it is noted that:

“(...) in essence, the individual's possibility of leaving their country may also remain jeopardized by a range of practices implemented by states which in fact benefit from a freedom of very broad appreciation (...)” (Moretti, 2020).

Law 36/2015 has no interference with the right to freedom of movement and the actions that the state has full discretion to undertake irregular migrations according to the opinion of the ACHRPR and the ambiguity of a regulatory text where the circumstance refers to a system of guarantees in fact also precluding migrants who find themselves in clear conflict with the obligations of article 12. This is in contrast with the material unavailability of the relevant and involved bodies that judicially protect the legal assistance of their immigrants.

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agreement with Niger for the reciprocal abolition of visas under the conditions provided for in it, are exempt from the requirement to present a visa (...)”.

43ACHPR, General Comment No. 5, cit., parr. 14, 15.

The ACHRPR also stated that states parties to the Charter ensure measures limiting the exercise of freedom of movement. These, however, are ambiguous and lay the foundations for the adoption of related restrictions on a discretionary basis<sup>44</sup>.

Thus it is specified that the measures provided for by law respect the limits that come from personal freedom. These are measures that are carefully constructed and introduce the relevant standards that each individual state risks reducing the application of the right to freedom of movement (Adeola, Viljoen, Muhindo, 2021).

The ACHRPR also stated that art. 12:

“(...) must guarantee the availability of an effective judicial remedy to those who believe they have suffered a violation in the exercise of the right to freedom of movement, specifying that in a judicial setting this right must in any case be subject to an extensive interpretation, in accordance with international standards (...) and no challenge has ever been made in court (despite the fact that the said law provides victims of trafficking with the right to initiate legal proceedings to seek compensation for damage caused)<sup>45</sup> (...) as Niger suffers from a lack of structures and bodies responsible for the judicial protection of migrants since the National Agency for Legal and Judicial

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44ACHPR, General Comment No. 5 on the African Charter on Human and Peoples’ Rights, 2019, op. cit., par. 17.

45Pilot Study on Migration and Respect for Human Rights Focus on the Responses Provided by Niger, op. cit., p. 66.

Assistance (ANAJJ) is effectively unable to carry out the functions for which it was established due to lack of funds and qualified personnel (...)” (Adeola, Viljoen, Muhindo, 2021).

We also add that the Pilot Study did not even have a registered office during the drafting period<sup>46</sup>. It is obvious that the positions are suitable to create a question of legitimacy of Law no. 36/2015 in connection with the obligations deriving from article 12 and which is causally part of the general Committee no. 5 of adopted after the entry into force of the aforementioned law. The ACHRPR itself has already expressed and asked states to modify their internal laws, stating that: “(...) that seek to curtail the free movement and residence (...)”<sup>47</sup>.

### **Final considerations**

The Pilot study for Niger has particular merit and we hope to be the start for the coming years for more research in the field of migration and in Africa as a product for the implementation of the European Union's outsourcing policies and as a reference point for help that must be given to people who are truly

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<sup>46</sup>Pilot Study on Migration and Respect for Human Rights Focus on the Responses Provided by Niger, op. cit., p.40.

<sup>47</sup>ACHR, General Comment No. 5, cit, par. 10.

suffering due to economic difficulties, thus combating irregular migration and being able to ensure development thanks to European funding which in reality the situation is not resolved in this way. There is a need for guarantees for respect for human rights.

Oxfam also orients itself in this spirit, stating that:

“(...) these difficulties could partly be overcome if the European Union rethinks the very concept of conditionality, avoiding subordinating the disbursement of financing to cooperation in the fight against irregular migration (...) (OXFAM, 2020) as part of a research that led to the publication of a recent report on the EUFT demonstrating how the enormous amount of funding devolved to Niger for the containment of irregular immigration has destabilized the economy and the security of the country by introducing restrictions on movement that have undermined resilience (...)” (OXFAM, 2020).

The problem of human rights violations in Niger is attributed to a conditionality mechanism that distances the original objectives of promoting democracy and protecting human rights as well as contributing to a series of critical issues that fuel the situation generally and constantly to a country that the objectives of promotion, implementation and protection of human rights set and achieve the objectives of Law 36/2015 which was created to combat the illicit trafficking of migrants by creating conditions

for the perpetration of human rights violations. The migration problem in Africa is not just an African problem, but a European one as we have seen and certainly a global one. The laws need to be strengthened by human, political and social will to put not economic and political interests at the center of protection but human beings as challenges for the coming years.

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